In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. . . . . .

JOHN J. BATTERMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The Circuit Court of Appeals for the Sixth Circuit affirmed the opinion of the Board of Tax Appeals (now the Tax Court of the United States) without opinion.

The Memorandum Findings of Fact and Opinion of the Board of Tax Appeals will be found at pages 136-149 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the act of February 13th, 1925, 43 Stat. 938 United States Code, Title 28, Section 347(a).

The judgment of the Circuit Court of Appeals was entered on February 25th, 1944. (R. 163.) Petitioner is allowed three months from February 25th, 1944 within which to file his petition for writ of certiorari. (Act of February 13th, 1925, c. 229, Section 8(a, b, d) 43 Stat. 940, United States Code, Title 28, Section 380, *Gipsy Oil Company v. Escoe,* 275 U. S. 498.)

A motion to say mandate was filed and allowed by the United States Circuit Court, Sixth Circuit, on April 5th, 1944.

STATEMENT OF THE CASE AND OF QUESTIONS INVOLVED.

The petition for writ of certiorari contains a statement of the case, the questions involved and the contentions of the petitioner. The findings of fact and the opinion of the Board of Tax Appeals appear on pages 136 to 149, both inclusive of the record.

The Circuit Court of Appeal for the Sixth Circuit affirmed the Board of Tax Appeals without opinion.

STATUTES INVOLVED.

The statutes involved are as follows:

Section 22(a) and (b) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, provides as follows:

"Sec. Gross Income.

(a) General Definition.—'Gross Income' includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

"(3) Gifts, Bequests, and Devises.—The value of property acquired by gift, * * * (but the income from such property shall be included in gross income);"

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in holding and deciding—

1. That the transfer of 9,000 shares of stock by the shareholders of a corporation to his brother-in-law and sister-in-law constituted taxable income, and that such transfer was not a gift exempt therefor under Section 213(b)(3) of the *Revenue Act* of 1936, c. 690, 49 Stat. 1648.
2. That petitioner was not restricted as of date of transfer in the disposition of more than 20% of such holdings per annum.
3. That the petitioner's stock should be valued at the stock market price as of date of transfer, even though a highly speculative stock.
4. That the conclusions of the Tax Court in arriving at its decisions were the result of reasons which existed in the case of *Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which the Supreme Court of the United States refused to support as proper reasons for the Tax Court's conclusions.

ARGUMENT.

As to petitioner's contention that the transfer of 9,000 shares Class "A" common stock of The Gabriel Company from Dr. Alfred R. L. Dohme to the petitioner and his wife was a gift and, therefore, the value thereof should not be considered taxable income, the petitioner relies chiefly upon the case of *Helvering, Commissioner v. American Dental Company*, 87 Sup. Ct. (Law Ed.) 574, which decision was rendered three days after the Board of Tax Appeals' opinion in this case was released and filed.

Dr. Alfred R. L. Dohme was the donor, and John J. Batterman, petitioner herein, the donee of the 9,000 shares of Class "A" stock of The Gabriel Company here involved.

The Gabriel Company (a corporation) was not instrumental in any way in instituting this transaction, nor

were the assets of that corporation affected one iota by the transfer. Dr. Dohme was the owner of such shares and gave them to the petitioner. The corporation did not engage in the transaction in any way, and as a matter of fact took no deduction in its tax returns, nor from its income or assets on the books for compensation because of the transfer of such capital stock to the petitioner from Dr. Dohme.

The uncontroverted evidence in this case clearly supports the statement that neither the petitioner, John J. Batterman, nor his wife, Elenora C. Batterman, were at any time employed by, nor did they perform any services whatsoever for Dr. Alfred R. L. Dohme, nor were there any services contemplated to be performed for and in behalf of Dr. Dohme by the petitioner or his wife. Further, Dr. Alfred R. L. Dohme was not indebted to petitioner, or petitioner's wife, in any account whatsoever. (R. 140.)

Petitioner realizes that in consideration of his petition for writ of certiorari that he is bound by the findings of fact of the Board of Tax Appeals (now the United States Tax Court), but is not bound by the conclusions reached by the Board of Tax Appeals from such facts.

In the instant case the Board of Tax Appeals made the following finding of fact:

> "Dr. Dohme was at first reluctant to agree to accept only 10,000 shares of such a large issue, but after discussing the matter with his wife concluded that his present holdings were of little value and that under the plan the 10,000 new shares might come to have some value in the future. Accordingly he consented to the proposal and gave to the petitioner his proxy to vote the Class 'B' shares in its favor. At the time of the discussion it was agreed that provision would also be made for a distribution to the petitioner and other key-men in the company out of the 40,000 shares to be issued to Dr. Dohme." (R. 137, 138.)

Further, the Board of Tax Appeals' findings of fact contain the following:

"The petitioner's personal associations with Dr. Dohme were unusually pleasant. The latter considered the petitioner, Beecher and Klein to be key-men of The Gabriel Company. It was his wish that all of them be given a financial interest in the corporation through the distribution among them of whatever number of shares remained out of his block of 40,000. Through his experience with another corporation in which he was interested he had come to believe that the ownership by its executives of a financial interest would act as an inducement to them to take more than a normal interest in the affairs of The Gabriel Company. He wanted the petitioner to remain in its employ and felt that the ownership of stock would be an incentive to him and to the other two men to continue to devote their best efforts to the company. It was his hope that the petitioner's continued association with it might enable the company to get on its feet and eventually give some value to his holdings. The foregoing were all factors motivating his decision that stock should be given to the petitioner and to Beecher and Klein." (R. 139, 140.)

The Board of Tax Appeals' findings of fact further contain the following:

"That the petitioner was a brother-in-law of Dr. Dohme is of very slight weight on the question of gift, for Klein and Beecher also received stock and they had no family connection with Dr. Dohme.

"There were other factors motivating Dr. Dohme's decision. He felt that the petitioner, Beecher and Klein were key-men in The Gabriel Company and wanted them to continue in their association with it. According to Dr. Dohme's testimony the petitioner was to make such use of the stock as in his judgment would serve the best purposes among the key-men of the company. He felt that a financial interest in its affairs would encourage them to stay and to take more than a normal interest in the affairs of the corporation. Those are motives associated with personal gain, rather than with beneficence. No extended review of the evidence is here necessary. We are convinced that Dr. Dohme's

> principal thought in consenting to the plan for re-adjustment of the capital structure of the corporation was the hope of ultimate betterment of his own financial position. That the petitioner too would personally benefit, although gratifying to him, was an incidental and secondary consideration. We think Dr. Dohme's interest in the re-organized company and the retention of the key-men therein clearly distinguishes this case from *Bogardus v. Commissioner, supra,* principally relied on by the petitioner." (R. 143, 144.)

Said findings of fact of the Board of Tax Appeals further contain the following:

> "The petitioner argues that in every case in which a bonus payment has been held taxable to the recipient, a debt or legal obligation existed which was liquidated by the payment. We disagree." (R. 144.)

Now in the light of the aforesaid findings of fact let us examine the holding of the Board of Tax Appeals in the case of *Commissioner v. American Dental Company, supra.* The Board of Tax Appeals, 44 B. T. A. (F) 425, 428, held as follows:

> "No evidence was introduced to show a donative intent upon the part of any creditor. The evidence indicates on the contrary that the creditor acted for purely personal reasons and did not forgive the debt for altruistic reasons, or out of pure generosity."

The *American Dental* case was one in which the chief issue was whether or not the forgiveness of indebtedness by creditors of the American Dental Company constituted a gift or taxable income, the Board of Tax Appeals holding that certain creditors forgave the company indebtedness to them for the purpose of putting the company upon its feet so that they would benefit by future business from the company. Now, the Supreme Court of the United States said in the *American Dental* case opinion, released a few days after the decision in this case, the following:

"With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the test to be applied to facts to determine whether the result is or is not a gift. The fact that the motives leading to the cancellations were those of business, or even selfish, if it be true, is not significant. The forgiveness was gratuitous. A release of something to the debtor for nothing is sufficient to make the cancellations here gifts within the statute."

It is readily discernible that the Supreme Court in *The American Dental Company* case over-ruled the conclusions of the Board of Tax Appeals, which conclusions were the same conclusions as arrived at in the instant case at bar. In both cases the Board of Tax Appeals held that reasons other than altruistic reasons led to the making of the gift, and that, therefore, it was taxable income, and in the *American Dental* case the court stated—

"The fact that the motives leading to the cancellations were those of business, or even selfish, if it be true, is not significant. The forgiveness was gratuitous. A release of something to the debtor for nothing is sufficient to make the cancellations here gifts within the statute."

The above citation from the Supreme Court's opinion in *The American Dental* case could be paraphrased and made applicable to the instant case by merely changing the word "forgiveness" to "transfer of shares," and by changing the word "cancellations" to "transfer of shares."

Applying the reasoning of the United States Supreme Court in *Helvering, Commissioner v. American Dental Company, supra,* certainly there is no finding in this case which points to the Tax Court's conclusion that either Mr. or Mrs. Batterman gave up anything, either in the way of

work, time or other thing of value for the stock received from Dr. Dohme. The Tax Court in this case has done exactly that which the Supreme Court of the United States says they are prohibited from doing, viz.: "to determine at will or upon evidence, and without judicial review the test to be applied to facts to determine whether the result is or is not a gift."

The Tax Court in the instant case has determined that the motive for the gift to Mr. and Mrs. Batterman was that of a business nature. The Supreme Court virtually said—The motives leading to the transfer of the shares to Mr. and Mrs. Batterman, by Dr. Dohme even though for business reasons is not significant. The gift was made gratuitously. Certainly Dr. Dohme released something to Mr. and Mrs. Batterman for nothing, and as his own testimony expressly states this was the result of his wanting to "be helpful" to Mr. and Mrs. Batterman. (R. 124.) Dr. Dohme was under no direct obligation in any way to Mr. Batterman. He had taken Mr. Batterman from Boston where he had conducted an unsuccessful business and was not a wealthy man. (R. 126.) Mr. Batterman's contract still had approximately four years to run (Ex. "C," R. 23) so that the purpose could not have been to maintain Mr. Batterman's connection with The Gabriel Company.

The reorganization in no way affected Mr. Batterman's employment contract then in force. (Ex. 9, R. 45.) Dr. Dohme was a wealthy man and had never made any gifts to Mr. and Mrs. Batterman heretofore (R. 140), but feeling that he was not giving away a great amount (R. 129), and undoubtedly feeling that Mr. Batterman having a stock interest in the company would weld him a little closer to the company's affairs after the reorganization (R. 126), is apparent from the Board's findings, and there certainly is no additional motive that could have prompted the gift from Dr. Dohme to Mr. and Mrs. Batterman, excepting that he desired to aid the petitioner and his wife.

Furthermore, we point out that Mrs. Batterman was never in any manner whatsoever connected with the company so that the argument to the effect that the motive was selfish cannot apply to Mrs. Batterman, and certainly Dr. Dohme did not have two separate purposes in mind in making the transfer of the stock to them jointly, that is to say, he would not have one purpose for Mrs. Batterman and one purpose for Mr. Batterman. If he wanted Mrs. Batterman to have a joint interest in the stock it must have been a gratuitous motive that prompted the gift to her. Dr. Dohme may have thought that giving the gift to them jointly would have made Mr. Batterman feel a little different toward the company, which had just been reorganized and which he was then heading and would head for an additional four years at least, but as the Supreme Court has stated in the *American Dental Company* case, *supra,* this fact does not take it out of the gift class.

Applying the rule laid down by the Supreme Court in the *American Dental Company* case, *supra,* the motives leading to the transfers are not important. They may even be business motives or selfish motives.

In discussing the definition of the word "gift" in the *American Dental Company* case, the Supreme Court said—

> "Gifts, however, is a generic word of broad connotation taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously."

In view of the fact that the same statute was under consideration in the *American Dental Comuany* case as is under consideration in the instant case it would seem to make the definition applicable.

The Supreme Court of the United States clarified the conflicting prior decisions in the lower courts in the case of *Bogardus v. Commissioner,* 302 U. S. 34 (19 A. P. T. R. 1195), *supra,* in which decision the court held that a be-

stowal of money, or something of value, cannot be, under the statute, both a gift and a payment of compensation. The Court had this to say on the subject on page 39 of Volume 302 U. S.:

> "The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation."

And, again on page 40 of the opinion—

> "If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A claim that it is a gift presents the sole and simple question of whether its designation as such is genuine or fictitious—That is to say, whether, though called a gift, it is in reality compensation. To determine that question we turn to the facts, which we have already detailed."

The facts in the case of *Bogardus v. Commissioner, supra,* are similar to those in the case at bar, and where such facts differ the facts in the case at bar are much stronger in favor of the petitioner than in the *Bogardus* case, *supra.*

In the case at bar, the petitioner was not at any time employed by Dr. Dohme, the donor, nor did a relation of debtor and creditor exist between them. Further, Dr. Dohme was under no legal, or other obligation to pay the petitioner, or transfer to him anything of value as salary, compensation or consideration of any kind. The donor and the petitioner were brothers-in-law and very friendly. Dr.

Dohme, the donor, knew and felt that the petitioner had received full compensation for the services rendered by him as an employee of The Gabriel Company, and did not intend that the transfer of the shares of stock here involved, be additional salary, bonus, or compensation for services rendered, or to be rendered by petitioner to such donor. As a matter of fact there was no contract, agreement or understanding between donor and the petitioner by virtue of the terms of which the donor was to transfer 9,000 shares of this stock to the petitioner.

In light of the *American Dental Company* case, *supra*, the transfer so made by Dr. Dohme to the petitioner was entirely voluntary, wholly without consideration other than a hope that the Company would do better financially and in this way aid his own holdings, and was purely a gift.

Every decision, both of the United States Tax Court and of the courts, specifically point out in cases holding that a delivery of something of value constituted compensation, that a debt or legal obligation existed which was liquidated by the delivery of the particular asset. In the instant case at bar, the only employer-employee relationship existing was that between the petitioner and The Gabriel Company, covered by written contract of November, 1931 and November, 1936 (Petitioner's Exhibits "B" and "C" Stf.) and it is uncontroverted that the petitioner's full and complete obligations to the company were set forth in said contracts and that said contracts were fulfilled both on the part of the company and the petitioner. The petitioner owed the duty to devote his full time and ability to the furtherance of the interests of The Gabriel Company and there has been no contention made that he did not furnish to the company his full time and his best and ablest ability in the management and operation of the company and in the fulfillment of his duties as an officer and director of the company, nor is there any claim here presented that the petitioner did not receive a full and ample salary for such

services. So pray tell, what further could the petitioner have possibly done to have earned any additional compensation from the company or any one else.

The company was not legally obligated to pay him anything additional because the best that he had was to be given to the company under his written contracts for which the company was to pay him a stipulated annual salary, which was paid. So certainly petitioner owed The Gabriel Company nothing, and they owed him nothing which could possibly be construed as compensation.

The Board of Directors of the company never by any resolution recognized any additional compensation due to petitioner, nor was any obligation to petitioner ever set up on the books of the company. In short, they owed him nothing beyond the compensation to be paid under said respective contracts, and this was at all times paid and is not involved in the present controversy. Therefore, The Gabriel Company owed petitioner nothing and having paid him nothing certainly cannot be claimed to have paid him said 9,000 shares as compensation, nor did Dr. Dohme pay any debt of The Gabriel Company.

Now, let us consider the relationship of Dr. Dohme who made the gift to his brother-in-law and sister-in-law, to-wit: Mr. and Mrs. Batterman. It is admitted and uncontroverted testimony that neither Mr. or Mrs. Batterman were indebted to Dr. Dohme, or that Dr. Dohme was in any manner obligated to either Mr. or Mrs. Batterman. Now, if this gift should be held to be compensation, it must likewise be compensation in payment of some debt or obligation for services rendered either in the past or the future. What services did petitioner ever render Dr. Dohme? The Commissioner contends that the reorganization of the company by petitioner was of benefit to Dr. Dohme. Remember, no contract ever existed between Dr. Dohme and the petitioner with respect to the payment of any compensation.

Now, let us analyze Dr. Dohme's position prior to the reorganization of The Gabriel Company. There was outstanding 198,000 shares of non-voting Class "A" common stock which was widely held and listed upon the New York Exchange. This "A" Common had represented the company's original capital which had been almost exhausted except for plant, machinery and equipment. The company had very little working capital, but Dr. Dohme owned 2,000 shares of "B" Common Stock which held the sole voting rights. In the reorganization Dr. Dohme surrendered his sole, absolute and complete control of the company and received therefor 10,000 shares of the "A" Common Stock, which by the reorganization had been increased from 198,000 to 300,000 and which had been given voting rights. So that where prior to the reorganization Dr. Dohme owned the complete voting shares, which even under the reorganization plan were worth 40,000 of "A" shares, and by control of which 2,000 shares he could have liquidated the company.

So we found Dr. Dohme surrendered his 2,000 shares, losing control of the company, and obtained only 22,000 shares out of a possible 300,000 and the only benefit that was received was a benefit to the company, namely the sale of certain shares by which the company obtained additional working capital or around $75,000.00. Obviously, Dr. Dohme was personally far worse off financially after the reorganization than he was prior to the reorganization, and this particularly in view of the fact that he personally, out of his own pocket and from said shares, paid the cost of the reorganization amounting to 18,000 shares of his stock. Why did Dr. Dohme do such a foolish thing? The answer is obvious. He is an extremely wealthy man and he did not desire to liquidate the company and cause his brother-in-law, the petitioner, to be out of work and cause the liquidation of the company, which also would have resulted in the loss of employment to Mr. Beecher and Mr. Klein whom he

had come to know. By the testimony in his deposition which shows that he did not consider the stock either before or after reorganization of much value and as long as he could, by paying the reorganization expense in stock to H. M. Preston & Company to the extent of 18,000 shares, keep the company afloat and at the same time give his brother-in-law and his two close friends continued employment and an interest in the company, which they previously had not had, he desired to do this rather than to liquidate the company, even though the reorganization meant that he personally would be worse off financially after the completion thereof, but he had assurance by Exhibit C that if the reorganization was effected and the company kept afloat, his aging brother-in-law would have a job and an interest in the company. This, unquestionably, was a motivating reason for Dr. Dohme consenting to the reorganization and the payment of the expenses thereof and making the gifts of stock in the reorganized company to his brother-in-law, his sister-in-law, and his two friends, Mr. Beecher and Mr. Klein.

LAW AND ARGUMENT ON QUESTIONS 2 AND 3.

The petitioner was not to sell or dispose of the 9,000 shares received by him from Dr. Dohme as a gift any faster than at the rate of one-fifth of such holdings per year. The New York Stock Exchange price of The Gabriel Company stock fluctuated between $7.50 per share and $1.50 per share. The corporation had lost money for several years. The only shock absorbers produced up to that time were outmoded and the company was pioneering with a new shock absorber of the direct-action type, but it did not have this new shock absorber either in production or in the hands of distributors. Much work had to be done by the corporation before it could produce a saleable product which by the very nature of the corporation was the basis for its existence. The stock of The Gabriel Company was

one of the most highly speculative issues in existence, and there was a restriction on selling Mr. Batterman's stock.

The District Court of the United States (District of Mass.) handed down a decision in the case of the *State Street Trust Company v. United States of America,* 37 F. (Supp.) 846, which clearly held that no taxable gain is realized where the securities involved cannot be sold by reason of a binding agreement not to sell the same, and the securities involved are of a speculative character. The here relevant portion of the syllabus in such case is as follows:

> "No taxable gain was realized in 1930 * * * because of a binding agreement not to sell the latter stock for one year and the speculative character of the security, the shares had no 'fair value' * * * even though the stock was listed on the New York Stock Exchange and on an unrestricted basis had a market value of 'about $44 a share.' "

This case was affirmed by the Circuit Court of Appeals (First Circuit) in 1942, in the case of *United States v. State Street Trust Company,* 124 F. (2nd) 948.

See also, *Propper, et al. v. Commissioner,* 89 F. (2nd) 617, reversing 33 B. T. A. 261 and *Schuh Trading Company v. Commissioner,* 95 F. (2nd) 404.

To the same effect is the case of *Tex-Penn Oil Company v. Commissioner,* 300 U. S. 481, 57 S. Ct. 569 (18 A. F. T. R. 1174). The Supreme Court said on page 499 of the opinion as it appears in Volume 300 U. S.:

> "The court is also of opinion that the judgment must be affirmed upon the ground that in the peculiar circumstances of this case, the shares of Transcontinental stock, regard being had to their highly speculative quality and to the terms of a restrictive agreement making a sale thereof impossible, did not have a fair market value, capable of being ascertained with reasonable certainty, when they were acquired by the taxpayers.

> "In the absence of such value, the ownership of the shares did not lay the basis for the computation of a gain at the time they were received, or for a tax as of that date under the applicable statute."

The courts are positive on the point that a restriction on the sale of speculative stock "strips the stock of an ascertainable value" in the year received, hence, the gain, if any, is not then reportable.

The United States Tax Court unquestionably recognized that the stock at the value assessed represented a fictitious value, but apparently felt that it was bound by Article 22(a)-3 of Regulations 94 because we find the following quoted in the opinion of the United States Tax Court in the instant case:

> "Under article 22(a)-3 of Regulations 94, the fair market value of the stock is to be included in petitioner's income. Turning, therefore, to the question of value, we find that respondent based his determination on the price at which sales were made on the New York Stock Exchange on the day in question, and that in the week within which that day fell sales of 2,800 shares were reported by the Exchange. Petitioner's contention that that valuation is excessive looks for support to the following circumstances. The book value in December, 1936 was only $2.61 per share; his shares were subject to an agreement restricting their sale; a brokerage firm failed to exercise an option to purchase 20,000 shares at $4 per share; he argues also that the fact that the company continued to operate at a loss during the ensuing years, and that after 1937 its stock did not sell on the New York Stock Exchange at a higher price than 3⅞, supports his contention that the 1937 sales were at fictitious values.
>
> "Though book value is not without effect as indication of actual value, we think that it alone can not be taken to establish a fair market value other than that determined by the respondent, in the face of the presumption of correctness favoring his determination."

Obviously the consideration of this Court under questions presented, 2 and 3, will only be required in the event that the determination of this Court with respect to question 1 is against the petitioner. In brief, that the stock transferred to the petitioner was not compensation to him.

RELIEF REQUESTED.

The petitioner requests the following relief:

(a) That an order be entered by this Court finding and determining that the deficiency heretofore assessed against the petitioner be vacated, and that the affirmation of the United States Court be reversed on the ground that the transfer of 9,000 shares to the petitioner and his wife constituted a gift under Sec. 22(b)(3) of the Revenue Act of 1936, and that judgment be entered for the petitioner and against the respondent to such effect.

(b) That in the event the court should decide that the transfer of said shares from Dr. Dohme to the petitioner and his wife constituted compensation and, therefore, taxable income under the Income Tax Law, that the court find that the fair value thereof be indeterminable as of February 23rd, 1937 by reason of the restriction placed thereon by agreement between the parties, and the speculative and fictitious value represented by the stock market quotation, and that such shares should only be taxed at the sale price in the years in which such portion of said shares were sold.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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